personal property of every character may be subjected to death taxation at the domicile of the owner and not elsewhere. Very few, if any of the states, would wish to give up the right to tax certain intangibles of all residents for the privilege of taxing similar intangibles of certain non-residents; neither would such procedure comport with what is generally recognized as the sound principle of death taxation.

This Court is conversant with the movement for reciprocity in death taxation which has been under way for several years. It is described in detail in the brief filed on behalf of the Tax Commission of the State of New York and the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, as *amici curiae*, in *Blodgett v. Silberman*, 277 U. S. 1. Reciprocity is based wholly upon the principle that the state of domicile of a decedent has and should have power to impose a death tax on all of his intangibles and this principle has received official sanction in more than three-fourths of the states.

The progress which has been made in this movement is shown by the report of the Committee of the National Tax Association on Reciprocity in Inheritance Taxation to the Twenty-second National Tax Conference held in 1929. (See Proceedings National Tax Association, 1929, pp. 200-226.) It was summarized in the following language (p. 203):

> "The great success which has attended the campaign for reciprocity during the current year seems to indicate that in a short time the duplicate taxation of inheritances by the states will be abandoned absolutely. At the present time, thirty-seven states, the District of Columbia, the Territory of Hawaii, the Province

of Ontario of the Dominion of Canada, and the Territory of the Yukon, have cooperated in this movement to abolish double inheritance taxes, leaving but eleven states, these chiefly of the west.

"It is interesting to note that the entire Union east of the Mississippi River, except the State of Kentucky, is in the movement.

"Turning to statistics, it is interesting to note that assuming that the population of the United States is 105,000,000, as it was in the census of 1920, 91,398,578 may now die peacefully with the assurance that there will be no duplicate taxation by the states upon the intangible assets of their estates."

Should this Court hold that the state of domicile has not the power to assess a death tax with respect to any intangibles, of whatsoever character or howsoever situated, the reciprocity movement would be given an effect directly contrary to the purpose which gave it birth. If it should be held that intangibles which have a business situs in a state foreign to that in which a decedent is domiciled may only be taxed by the state of such situs, and that state has a reciprocity law, it would be prohibited from exercising its power of taxation until such time as the reciprocity law was repealed. In the majority of the states, the legislature does not meet annually. Thus, for a considerable period of time, intangibles having a business situs would be entirely exempted from taxation unless state lawmaking bodies should be called into special session for the purpose of repealing reciprocity laws. The confusion, inconvenience and loss of revenue which would follow from denying the state of domicile of a decedent the power to exact a death tax on account of any of his intangibles ought, if possible, to be avoided.

Should it be determined that the state of domicile alone has the power to tax all intangibles of a decedent,

reciprocity statutes would become superfluous, but no harm would result, as such a decision would effectually and completely bring about the end for which reciprocity was intended.

It may not be amiss to observe that reciprocity was designed to make effective the second of the principles laid down in the report of the committee appointed by the National Conference on Inheritance and Estate Taxation, viz., that all intangible personal property should be subjected to death taxation but once, and that by the state of domicile of the decedent. (See Reports of Proceedings of National Conferences on Inheritance and Estate Taxation held at Washington, D. C., February 19-20, 1925, and New Orleans, La., November, 1925.) These reports indicate that the best thought of economists, business men and tax officials throughout the Nation is in accord on the principle that the state of his domicile should have the power to impose a death tax on all intangibles of a decedent, to the exclusion of all other states.

Let us see what might be the result of a decision contrary to that contended for in this brief. Take, for example, shares of corporate stock and assume the decision to be that they may be subjected to a death tax only at the domicile of the corporation. A copper magnate is domiciled in New York at the time of his death. He is possessed of a large fortune represented principally by shares of stock in a corporation owning copper mines in Montana. The mining corporation was organized under the laws of Maryland and is domiciled there. Manifestly, there are substantial reasons why New York, as the state of domicile of the decedent, should have power to levy a death tax. The owner had resided there and his wealth as well as his person had been protected by its laws. Strong reasons may

also be advanced in favor of permitting Montana to collect a death tax. The corporation carries on its business there and the wealth was the product of its mines. What can be said in favor of a tax by Maryland? Very little. The corporation maintained an office there it is true, but such office was merely for the purpose of complying with strictly legal requirements. The corporation did no business in the state and had its domicile there only for reasons of convenience. Maryland had been repaid for all of the privileges which it granted to the corporation through the medium of taxes levied upon it. Surely, much more could be said in favor of the levying of a death tax by Montana than by Maryland. When we come to examine the law we find it to be definitely settled by this Court that Montana may not tax. *Rhode Island Hospital Trust Co. v. Doughton,* 270 U. S. 69. Is Montana to be denied this right only that it may be conferred upon Maryland? Or is the decision to be that the state of the decedent's domicile, the one which has the strongest legal and equitable claim, is to have the power to tax? We trust the latter.

It is true that some of the considerations that have been mentioned are, at best, persuasive, but it will now be argued that the law is not at discord with them.

Perhaps the first jurist of distinction to advance the thought that the Constitution of the United States forbade the extra-territorial death taxation of intangibles was Judge Clearwater of New York, who at the Forty-eighth Annual Meeting of the New York State Bar Association in 1925, in a masterful and emphatic manner, laid bare the abuses of nonresident death taxation and called for action to correct them. (See Report of New York State Bar Association, Vol. XLVIII, pp. 242-245.) As a result of Judge Clearwater's address, the New York State Bar Associa-

tion appointed a Committee on Extraterritorial Taxes which has given careful consideration to the subject and has submitted reports at the annual meetings held each year since 1925. (See Reports of New York State Bar Association, Vols. XLIX, L, LI, LII and LIII.)

The Court will be interested in the comment of Judge Clearwater on the Minnesota decision. In a communication to the editor of the New York Times, which appears in the issue of January 19, 1930, section 3, page 5, column 4, he said:

> "For several years the taxing authorities of the State of New York and of some other States have imposed upon the estates of decedents holding securities issued by corporations incorporated in or created by a State other than that of the domicile of the decedent an extraterritorial tax; that is, if a resident of New York holding stock in a corporation organized in or created by the laws of another State dies, his beneficiaries have been compelled to pay not only the Federal and New York transfer tax but sometimes a third, fourth and fifth tax imposed by a State under the laws of which the corporation or corporations were organized.
>
> "It frequently has been said that I was the first lawyer in the United States publicly to denounce this system and to characterize it as unconstitutional, illegal, extortionate and iniquitous. At all events, I did so in an address to the members of our New York State Bar Association.
>
> "The Supreme Court of the United States in the case of Frick v. Pennsylvania, 268 U. S. 478, sustained my contention.
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> "In Blodgett v. Silberman, 277 U. S. 1, in construing Blackstone v. Miller, 188 U. S. 189, it was claimed by some of the refined casuists, of various State taxing authorities, that the Supreme Court had retreated from this attitude in the Frick case.
>
> "I was unable to concur in that view. Diverse opinion, however, is made negligible by the masterly

opinion of Justice McReynolds, who on Jan. 6 delivered the opinion of the court in the notable case of the Farmers' Loan and Trust Company, as sole surviving executor of the last will and testament of Henry R. Taylor, deceased, appellant, v. the State of Minnesota, defendant. In that case, with admirable courage, force and clarity, that distinguished judge brushed aside the ingenious and involved sophistries of the advocates of extraterritorial taxation, pointedly saying that to sustain that doctrine and practice would be 'to disturb good relations among the States and produce the kind of discontent expected to subside after the establishment of the Union, and that the court is compelled to hold it untenable, and, to prevent misunderstanding, it is definitely overruled.' Justice Stone, in a separate opinion, concurred.

"This decision effectually and finally terminates a practice that is abhorent to any student of the common law of our constitutional system, a system which treats the several States as a Union, not as a mere confederation of distinct and separate sovereignties, and reaffirms the ancient and for centuries undisputed doctrine of the common law, *mobilia sequuntur personam* (things movable go with the person).

"Peradventure the taxing authorities of this and other States venture to ignore this determination of the Supreme Court, it may be necessary to institute proceedings in the Federal courts to hold them personally responsible for such loss as may be sustained by their illegal action, and the money expended in the effort to obtain redress.

"*Pari ratione* those of us who closely follow the decisions of the Supreme Court of the United States and of the Court of Appeals of this State constantly are impressed not only with conclusion predicated upon universally acknowledged fundamental principles of justice but by an entire absence of technical construction. Every problem courageously is confronted, justly and finally dealt with, there being none of that evasion of responsibility or vacillation not infrequently resorted to by lesser judicatories. Both courts justly are entitled to that stately appellation of the ancients —august tribunals of justice."

It is now definitely and, without doubt, finally determined that the power to impose a death tax on real property and tangible personal property is lodged with the state of actual situs and that no other state has the right to impose a death tax with respect thereto.

Keeney v. New York, 222 U. S. 525.
Matter of Swift, 137 N. Y. 77.
Frick v. Pennsylvania, 268 U. S. 473.

It is also the established doctrine of this Court that the maxim *mobilia sequuntur personam* is applicable to intangible personal property and that the situs of intangible personal property owned by a decedent at the time of his death is at his domicile.

Blodgett v. Silberman, 277 U. S. 1, *supra*.

Note should be made of the fact that the intangibles owned by the decedent in the case just cited, and which were held to have their situs at his domicile, included shares of stock in corporations foreign to the domicile and intangibles which had a business situs in a foreign state. The decedent was a resident of Connecticut. He had an interest as general partner, valued at $1,687,245.34, in the partnership of William Openhym & Sons, doing business in New York and organized under the Limited Partnership Act of New York. He also owned certificates of stock in New York, New Jersey and Canada corporations appraised at $277,864.25. If it is to be decided that but one death tax may be levied, it is necessary that the power to levy this tax be granted to the state of the domicile of the decedent with respect to all of the intangible personal property involved in the case of *Blodgett v. Silberman* unless this Court is prepared to overthrow the doctrine of that case.

It is respectfully urged that this Court should find that the situs governs in the death taxation of intangible

personal property as well as in the taxation of tangible personal property and real property. This would provide a simple and equitable rule, applicable alike to all classes of property owned by a decedent, and would put an end to many of the perplexing problems which have made the administration of estates a difficult and complicated matter.

If this Court should determine to lay down such a doctrine, it is possible that it will be necessary for it to distinguish or overthrow some of its *dicta* in the old cases and perhaps to discard some earlier holdings. It would seem, however, that such procedure is fully warranted at this time when the law of death taxation is being resettled. The major operation was performed when *Blackstone v. Miller* was overruled. Such minor additions and excisions as may be found necessary ought not to be viewed with alarm. It is quite evident that the true principles which underlie death taxation have not been clearly understood and applied. There has been some loose thinking and confusion of principles which apply to other forms of taxation but which rightly are inapplicable to death taxation.

Sight of the fact that death taxes are taxes upon the transfer of the property at the death of the owner has been lost. Death taxes have been imposed on the theory that they are the same as property taxes or other forms of excise taxes. Take the case of corporate stock, the state in which the corporation is organized has the undoubted power to levy an organization tax, franchise taxes and property taxes upon the property of the corporation within its jurisdiction, for all of which it delivers a *quid pro quo* in the form of governmental benefits, but because it has the power to levy these taxes is no reason why it should be permitted to levy a death tax upon the transfer of the shares of corporate stock which are owned by a nonresi-

dent. These shares have their situs at the domicile of the decedent.

The point may be illustrated by considering the taxation of United States bonds. It is within the jurisdiction of Congress to enact that bonds of the United States may be subjected to property taxation at the place where they are physically present and nowhere else. Should it be so enacted, if a resident of New Jersey owned such bonds and kept them in a safe deposit box in the City of New York, New Jersey would have no right to impose a property tax thereon because, under the Constitution of the United States, the bonds may not be taxed at all unless Congress consents. But New Jersey would still have the right to levy a death tax upon the bonds upon the death of the owner because his domicile is in that state and the death tax is not on the bonds as property but upon the transfer thereof at the owner's death. See *Plummer v. Coler,* 178 U. S. 115. This clearly shows that principles applicable to property taxation may have no place in death taxation.

The legal principle which it is believed should control in the death taxation of intangibles is that the transfer upon the death of the owner can only take place where the intangibles have their situs. The transfer of property can only take place where the property is. Property cannot be transferred where it is not. Inasmuch as intangibles have their situs at the domicile of the owner, it is only at his domicile that they may be transferred at his death. The state where the property is and is transferred is the only one which consistent with due process of law should have the power to exact a transfer tax. As before stated, all death taxation should be founded upon the situs of the property regardless of its character or use.

This Court is aware that the question of the death taxation of intangibles is not alone of the greatest importance but also that it is the cause of much uncertainty throughout the Nation at the present time, due to the decisions in the Minnesota and Missouri cases and doubt as to whether the rules laid down in those cases apply to classes of intangibles other than those directly involved. It would be extremely helpful if in this case this Court should see fit to lay down a broad principle applicable to all intangibles, and thus, once and for all settle the issue.

A careful examination of the decisions of this Court fails to show that it has ever passed directly upon the death taxation of corporate shares which is, of course, the most important question still open.

The attention of the Court is invited to the recent decision of the Jefferson County Court of Kentucky in *Equitable Trust Company of New York v. Kentucky State Tax Commission* in which it was held that shares of stock in a Kentucky corporation owned by a deceased resident of New York were not subject to death taxation in Kentucky. This decision was based upon the Minnesota opinion and is reported in the United States Daily of September 29, 1930. So far as can be ascertained, it has not as yet been officially reported.

All of which is respectfully submitted.

SETH T. COLE,
Counsel for
Amici Curiae,
Office and Post Office Address,
Room 530, State Office Building,
Albany, N. Y.

WILLIAM DALE O'BRIEN, ESQ.,
With him on the brief.